SYARIKAT KOTA GELINGGI QUARRY (JERANTUT) SDN. BHD. *a*

v.

CONSTRUCTION & DEVELOPMENT CORP. OF THE PHILIPPINES

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 207 OF 1983] *b*
28 DECEMBER 1983

CIVIL PROCEDURE: *Application for summary judgment dismissed as there were triable issues - There was a contract between the plaintiff and a subsidiary of the defendant to supply metal stones - The triable issue was whether the defendant gave an undertaking to assume the liabilities.* *c*

The plaintiff made an application for summary judgment. The plaintiff entered into a contract with a subsidiary of the defendant to supply metal stones. The subsidiary did not make full payments. The plaintiff contended that the defendant had undertaken to assume those liabilities.

Held: *d*
The application was dismissed as there was a triable issue as to whether the defendant had given such an undertaking.

[Application dismissed.]

Case referred to:
Fieldrank Ltd. v. Stein [1961] 3 All ER 681 *e*

Legislation referred to:
Rules of the High Court 1980, O. 14.

For the plaintiff - Balendran; M/s. Balendran, Chong & Bodi.
For the defendant - Khaw Chay Tee; M/s. Allen & Gledhill

JUDGMENT *f*

Shaikh Daud Ismail J:

This is an application for leave to sign final judgment under O. 14 r. 1 of the Rules of the High Court 1980 on the ground that the defendant has no defence to the action. The application is supported by the affidavit of the managing director of the plaintiff company, one Anthony Chong Ngian Hin. The plaintiff issued a writ against the defendant dated 28 *g*
June 1983. By summons-in-chambers dated 27 July 1983 the plaintiff applied for seizure and attachment before judgment of all moveable and immovable properties of the defendant company which application was granted by this Court on 9 August 1983. By another summons-in-chambers dated 1 September 1983 the defendant sought to set aside the order of attachment before judgment given on 9 August 1983. This application was heard and dismissed on 15 September 1983. *h*

The statement of claim shows that the plaintiff is a quarrying company and alleged that:

(a) by an agreement dated 29 July 1979 the plaintiff entered into an agreement with one Asiavest-CDCP, a subsidiary of the defendant (hereinafter referred to as the said subsidiary) under which contract the plaintiff agreed to supply metal stones to the said subsidiary; *i*

(b) sometime in April 1981 while the contract is still subsisting the plaintiff reduced the supply of metal stones due to non-payment of monies due and owing by the said subsidiary;

(c) on or about 12 September 1981 the defendant represented by one Mr. A.J. Lontok and the representatives of the plaintiff met at the defendant's request at the defendant's office whereupon the defendant agreed and undertook to make all payments due by the said subsidiary to the plaintiff, if the plaintiff continued to carry on supplying the said materials;

(d) there was then a balance sum due and owing to the plaintiff by the said subsidiary of RM307,755.84 of which the defendant made part payment of RM150,000;

(e) the plaintiff thereupon continued to supply the said material to the said subsidiary on the said undertaking of the defendant to be responsible for payment;

(f) since then the defendant has made a number of payments;

(g) the balance now due and owing by the defendant to the plaintiff is RM480,525,63.

(h) the plaintiff, therefore, claims the sum of RM480,525,63, damages for breach of undertaking, interest and costs.

The affidavit of Anthony Chong Ngian Hin in support of the O. 14 application contained substantially the facts deposed to in the statement of claim. On perusing this affidavit I find that the plaintiff has emphasised and is relying heavily on 3 matters namely;

(a) the meeting of 12 September 1981 when the alleged undertaking was given;

(b) the first payment by the defendant of RM150,000 and subsequent payments; and

(c) accounts due to the plaintiff was supplied by defendant after 10 October 1981, and all correspondences thereafter were between plaintiff and defendant.

In opposing the application for summary judgment an affidavit on behalf of the defendant was filed by one Jesus O. Ang, the area cum finance manager of the defendant. In his affidavit the defendant denied that Asiavest-CDCP is a subsidiary of the defendant. The defendant contended that they are a Philippine based company and that Asiavest-CDCP is a company incorporated in Malaysia as a joint-venture between the defendant and Asiavest Holding Bhd. of which defendant's equity is only 49%. The defendant, while admitting that there was a meeting on 12 September 1981 between one Mr. A.J. Lontok and representatives of plaintiff, denied that at the meeting any undertaking as alleged by the plaintiff was given. While also admitting that defendant paid RM150,000 to the plaintiff, the defendant asserted that this payment was on behalf of Asiavest-CDCP because of the contractual relationship between defendant and Asiavest-CDCP whereby defendant had sub-contracted its contracts to Asiavest-CDCP and that if and when Asiavest-CDCP had cash-flow problems in the course of its business the defendant would make available to Asiavest-CDCP cash advances

to enable it to pay its creditors and in urgent cases such advances would be paid direct to the creditors. The defendant also claims that all subsequent payments made to the plaintiff were at the request of Asiavest-CDCP.

Now an O. 14 procedure is a device to provide a speedy and economical process for obtaining judgment when there is in fact and in law no defence at all. This process to obtain summary judgment is intended to apply to cases where there is no reasonable doubt that the plaintiff

is entitled to such a judgment and it being inexpedient to allow a defendant to defend where in fact and in law he has no *bona fide* defence or raise an issue against the claim which ought to be tried.

In opposing the application the defendant can satisfy the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim. It is only in very clear cases that the defendant should be shut out from defending a claim against them.

As I stated earlier, the whole emphasis of the application is based directly on the alleged meeting on 12 September 1981 between one Mr. A.J. Lontok on behalf of the defendant and Mr. Anthony Chong Ngian Hin and one Mr. Chong on behalf of the plaintiff. It is the contention of the plaintiff that at this meeting Mr. A.J. Lontok on behalf of the defendant gave an undertaking that defendant will sort of step into the shoes of Asiavest-CDCP and assume all the liabilities of that company in so far as payment to the plaintiff is concerned. Plaintiff also contends that pursuant to this defendant even paid them a sum of RM150,000 followed by other payments, such payments being due from Asiavest-CDCP to plaintiff. The defendant on the other hand, contended that no such undertaking was ever given by A.J. Lontok or anyone else on behalf of the defendant. Defendant contended that on the application of Asiavest-CDCP and in order to assist Asiavest-CDCP of its cash flow problem, the defendant merely agreed to advance to Asiavest-CDCP such payments to enable them to meet their creditors. All such payments made by the defendant were in fact payment made on behalf of Asiavest-CDCP.

After perusing all the relevant affidavit filed in support of and in opposition to the application and after hearing lengthy arguments by both learned Counsel, it is my judgment that what transpired at the meeting of 12 September 1981 between representatives of both the plaintiff and defendant is a crucial factor to both the parties and their respective assertions stand or fall by this. There is no written evidence of the alleged undertaking. From the date of the meeting, which in fact did take place as conceded to by the defendant, there is no reference in all the correspondences of the alleged undertaking. Whether there was such an undertaking given at the meeting of 12 September 1981 as alleged by plaintiff and what were its terms can only be determined by hearing evidence from all those who were present and such evidence being tested by cross-examination. As such, it is the contention of the defendant that this crucial factor is a triable issue and is in fact a valid defence. For myself, after reading all the documents filed, I am unable to say whether there was an undertaking and what its terms were. I entertain doubts as to what actually transpired at the meeting of 12 September 1981. It is my judgment that only after hearing evidence that the Court can decide on this issue. I therefore agree with the defence contention that this is a triable issue.

The next point is that Jesus O. Ang in his affidavit stated that he was present at the meeting of 12 September 1981 whereas the affidavit of Anthony Chong Ngian Hin does not mention his presence. This too, in my view, is a triable issue as evidence has to be adduced as to who were actually present at this meting. There may have been minutes taken at this meeting, which can be tendered as evidence.

As I mentioned earlier, the defence in order to oppose the application can satisfy the Court that there are serious questions to be tried. It is my judgment that the defendant has satisfied me that there are triable issues which can only be determined by evidence at a trial. Accordingly, I grant the defendant leave to defend and dismiss the application under 0.14.

The plaintiff contends that if leave to defend is granted it should be conditionally upon a payment of deposit into Court or a bank guarantee be furnished. Following the decision in the Court of Appeal case of *Fieldrank Ltd v. Stein* [1961] 3 All ER 681, I am of the view that conditional leave ought to be granted only in cases where there is some evidence to show that the defence put up is a sham defence purely to delay the claim or there is something suspicious in the defendant's mode of presenting its case or when the defence is shadowy or there is little or no substance at all. In the circumstances of this case it is my judgment that there is nothing suspicious, shadowy in the manner in which the defendant presented its case nor is the defence a sham one. The defendant has successfully established that there are triable issues on which the plaintiff in fact heavily relies on and as such the defendant is granted unconditional leave to defend.

Also found at [1984] 1 CLJ 315